IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 304

JOHANN CARL PFLUEGER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, ROBERT H. JACKSON, Attorney General of the United States, as Alien Property Custodian, and W. A. JULIAN, Treasurer of the United States.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Your petitioner, Johann Carl Pflueger, respectfully prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia entered on April 7, 1941.

Opinions Below.

The opinion of the District Court dismissing the complaint for lack of jurisdiction is not reported but may be found in the record (R. 240). The opinion of the Court of

Appeals filed April 7, 1941 affirming the District Court is set forth in the record (R. 248-254). A petition for rehearing duly filed was denied on April 28, 1941 (R. 255).

Jurisdiction.

The jurisdiction of this court is invoked under the provisions of Section 240(a) of the Judicial Code as amended (Title 28 U. S. C. 347).

Summary Statement of the Matter Involved.

Your petitioner brought this suit in the District Court of the United States for the District of Columbia, pursuant to the provisions of Section 9(a) of the Trading With The Enemy Act as amended (40 Stat. 419, 50 U. S. C. appendix) and the 5th Amendment to the Constitution of the United States, to recover just compensation for property seized by the Alien Property Custodian and disposed of by him at a price far less than its true value. The suit is for the difference between the actual value of the property and the amount realized for it by the Alien Property Custodian which latter sum had been returned to petitioner.

The District Court and the Court of Appeals for the District of Columbia held that there was no jurisdiction in the District Court to entertain such a suit because of Section 7(c) of the Trading With The Enemy Act which purports to limit recovery for seizures to the "net proceeds" of the seized property (R. 240; 253-4).

The essential facts are not controverted. Petitioner was born in the Hawaiian Islands in 1861 (R. 104). By virtue of his Hawaiian birth he became a citizen of the Repub-

lic of Hawaii, and upon annexation of the territory by the United States, an American citizen by operation of law. His American citizenship is not questioned by respondents.

For some time prior to the entry of the United States into the World War in 1917, petitioner was engaged in business in Bremen, Germany, as sole owner of the firm of J. C. Pflueger & Co. (R. 106). The business conducted was that of European representative of H. Hackfeld & Co. Ltd., (R. 106) which was probably the largest commercial enterprise in the territory of Hawaii.

Shortly after the entry of the United States into the War petitioner began his efforts to leave Germany. Upon learning that the Spanish diplomatic authorities had undertaken the representation of American citizens in Germany, he applied for an extension of his American passport which was granted by the Spanish authorities on June 15, 1917 (Pflueger Ex. 2, R. 197). He thereupon applied for a new passport to enable him to travel to the United States which was issued in Washington but did not reach Germany until May or June 1918 (R. 124). Upon being advised of its arrival he made application to the German authorities for permission to leave Germany (R. 124, 125). This was denied on June 1, 1918 (Pflueger Ex. 5, R. 201, 202). Thereafter, on June 21, 1918, the Spanish Embassy in Berlin issued to petitioner a certificate of identity as an American citizen permitting him to remain in Germany for the duration of the War (Pflueger Ex. 6, R. 203). On May 17, 1920 he obtained an emergency United States passport from the United States legation at The Hague (Pflueger Ex. 17, R. 217). Three days later he sailed from Holland for the United States (R. 125) where he has since resided continuously (R. 122).

During the last War, petitioner was registered with the German authorities as an American citizen (Pflueger Ex. 4, R. 201), and was required to report to the German police at frequent intervals to give an account of his activities (R. 109). At all times he was acknowledged by the State Department in Washington to be an American citizen (Pflueger Ex. 7, R. 204-5).

Petitioner owned five hundred shares of preferred and twelve hundred and forty-six shares of the common stock of H. Hackfeld & Co. Ltd. and sixteen hundred and twenty-nine shares of Pacific Guano & Fertilizer Co. Ltd. (R. 4), both Hawaiian corporations. On January 28, 1918 the then Alien Property Custodian, through his agent in Honolulu seized all of this property (R. 4).

The Custodian, through the seizure of petitioner's stock and that of certain other persons, obtained control of the Hackfeld Co. and caused it to transfer all of its assets to the American Factors Ltd., a corporation which he formed for the purpose (R. 5). The record shows that the amount paid for the entire assets of the Hackfeld Company was only about three times its earnings for 1917, the last full year it was in business (R. 174). Petitioner's stock in the Pacific Guano & Fertilizer Company, was sold by the Custodian at auction principally to American Factors Ltd. (R. 5). The company had had a long and successful history and in 1917 paid dividends of fifteen per cent. (R. 120-1).

The seizure and proposed sale of petitioner's property came to his attention while he was in Germany and he immediately protested through the Spanish Embassy and the State Department asserting his American citizenship (R. 214-5). The Custodian was advised of this by the State Department (R. 214-5) but in complete disregard of peti-

tioner's protests, proceeded with the arbitrary disposition of his property.

In November 1937, after unsuccessfully endeavoring to hold Germany and the individual purchasers of American Factors Ltd. stock liable for his loss and shortly after the decision of this court in *Becker Steel Co.* v. *Cummings,* 296 U. S. 74, petitioner brought this suit, relying upon this Court's reasoning and interpretation of the Trading With The Enemy Act in that case.

Questions Presented.

1. May the property of an American citizen be seized and disposed of by officers of the United States Government without granting to the citizen recourse to the courts to establish his claim for just compensation guaranteed him by the Fifth Amendment?

2. Does the provision of Section 7(c) of the Trading With The Enemy Act purporting to limit recovery to the net proceeds of seized property deprive the district courts of jurisdiction to hear the claim of a citizen for just compensation for property seized by the Alien Property Custodian and disposed of by his subordinates at a price fixed by him which is far below the true value?

3. Is there not a conflict of decision between the United States Court of Appeals for the District of Columbia in this case and the United States Court of Claims in *Escher* v. *United States,* 68 Ct. Cls. 473; cert. den. 281 U. S. 752, upon the question of the jurisdiction of the district courts under the Trading With The Enemy Act in a case like this?

Reasons Relied on for the Allowance of the Writ.

This case involves a question of great public importance which has not been determined by this Court. Congress may, at any time, authorize the taking of property for any use of the United States. It may authorize an administrative officer to effect the seizure and it may, as it did in the Trading With The Enemy Act, authorize such officer to dispose of the seized property. It may not, however, we submit, limit the citizen owner of the property to the amount realized for it by the officer and deny the citizen the right of access to the courts to assert his claim for just compensation for his property guaranteed him by the Fifth Amendment. The Court of Appeals in this case has in effect held that it may.

In *Becker Steel Co.* v. *Cummings,* 296 U. S. 74, this court had occasion to consider the effect of section 7(c) of the Trading With The Enemy Act. There, an American corporation which had received the net proceeds of the sale of its property brought suit to recover certain expenses of the sale which had been deducted by the Alien Property Custodian. This court held that such an action would lie notwithstanding section 7(c) of the act limiting recovery to the "net proceeds" held by the Alien Property Custodian. In reaching its conclusion this court recognized the fundamental principle involved here in the following language (p. 79):

> "The implication that by the appropriation of private property to public use the United States undertakes to make just compensation for it, see *United States* v. *Lynah,* 188 U. S. 445, 471; *Jacobs* v.

> *United States,* 290 U. S. 13; *Perry* v. *United States,* 294 U. S. 330; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, must likewise enter into the construction of a statute giving to a non-enemy a remedy for the seizure of his property as a war measure. Only compelling language in the congressional enactment will be construed as withdrawing or curtailing the privilege of suit against the government granted in recognition of an obligation imposed by the Constitution. See *Lynch* v. *United States,* 292 U. S. 571, 586, 587; *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489. Hence Sec. 9(a) must be broadly construed to give effect to its remedial purpose, see *Miller* v. *Robertson,* 266 U. S. 243, 248; *Behn, M. & Co.* v. *Miller,* 266 U. S. 457, 471, 472."

This court, however, did not pass on the specific issue involved here but left it open for future determination in a case presenting the question, saying at page 80:

> "In the present state of the record it is unnecessary to inquire whether the effect of the act is to sanction in every case the sale of the property of a non-enemy giving him recourse only to the proceeds of sale. See *Sielcken-Schwarz* v. *American Factors* (C. C. A., 2nd) 60 F. (2d) 43, 44. That question was not raised or considered below."

The case at bar squarely presents the question left open in the *Becker Steel Company* case. So far as we know it is the first case in which this problem has reached this court on petition for certiorari or otherwise.

This court has been extremely careful in all cases brought to its attention to preserve the right of a citizen to obtain just compensation through the courts, *Jacobs* v. *United States,* 290 U. S. 13, 16; *Monongahela Navigation*

Co. v. *United States,* 148 U. S. 312, 336; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 88. The Court of Appeals disregarded these cases and the reasoning of this court in the *Becker Steel Company* case and adopted a new theory in holding that the provisions in section 7(c) (added by an amendment to the Act adopted on November 4, 1918) effectively oust the district court of the jurisdiction provided by Section 9 of the original Act (R. 253).

The decision of the Court of Appeals is in direct conflict with the decision of the Court of Claims in *Escher* v. *United States,* 68 Ct. Cls. 473, cert. den., 281 U. S. 752. That case involved the seizure of certain railway stock by the Alien Property Custodian which was sold to the director general of railroads. Subsequently, the director general sold the stock at a profit of upwards of a million dollars. The owner of the stock who had received the proceeds of the sale by the custodian to the director general brought suit in the Court of Claims to recover this profit. The Court of Claims held that by reason of the provisions of Section 9(a) of the Trading With The Enemy Act, exclusive jurisdiction to hear all cases arising under the Trading With the Enemy Act was vested in the district courts and that in consequence it was without the jurisdiction.

The decision of the Court of Claims in the *Escher* case and of the Court of Appeals for the District of Columbia in this case are in direct conflict on this question of jurisdiction. Unless this conflict is determined, a citizen in the position of petitioner is left entirely without remedy. There is no court to which he can turn to obtain just compensation for the sale or disposition of his property but he must be satisfied with the proceeds received by the custodian irrespective of the adequacy of such proceeds.

Conclusion.

Your petitioner respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the District of Columbia and that this cause be reviewed and determined by this Court, that the judgment of the United States Court of Appeals for the District of Columbia be reversed and that petitioner be granted such other and further relief as to the Court may seem meet and proper.

Respectfully submitted,

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THE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the district court dismissing the complaint for lack of jurisdiction (R. 240) is not reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 248–254) is not yet reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered April 7, 1941 (R. 254). Petition for rehearing

was denied on May 29, 1941 (R. 255). The petition for a writ of certiorari was filed July 24, 1941. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether under the Fifth Amendment and the Trading with the Enemy Act, a federal district court has jurisdiction of an action to recover an amount in excess of the net proceeds of the sale of property seized under the Trading with the Enemy Act.

STATUTE INVOLVED

The applicable portions of the Trading with the Enemy Act are set forth in the Appendix, pp. 9–12.

STATEMENT

Petitioner, an American citizen, resided in Germany during the war. The Alien Property Custodian seized his American property, consisting of certain shares in two corporations, in January 1918 (R. 2–4), because, as a person resident in Germany, Pflueger was an enemy as defined by Section 2 (a) of the Trading with the Enemy Act. Under the direction of the Custodian, the stocks of petitioner which had been seized were sold (R. 4–5). The proceeds of the securities in the sum of $506,169 were returned to petitioner between

1920 and 1922 (R. 6). Petitioner contends that the full and true value of the stocks in January 1918, the date of the seizure, was $1,579,410 (R. 4).

Petitioner's complaint was filed in the United States District Court for the District of Columbia on November 1, 1937 (R. 1–12), against the United States, the then Attorney General as Alien Property Custodian, and the Treasurer of the United States "for the Recovery of Just Compensation under the Fifth Amendment and Section 9–a of the Trading with the Enemy Act" (R. 1), on the theory that the seizure and sale of petitioner's property by the Custodian constituted a taking of private property for public use, for which the United States is obligated to pay just compensation, and that petitioner was entitled to recover the true value of the stock at the date of its seizure, together with interest thereon. The respondents moved to dismiss the complaint on jurisdictional grounds and contemporaneously moved for summary judgment on the ground, *inter alia,* that the petitioner was an "enemy" as defined by the Trading with the Enemy Act and was not entitled to more than the proceeds of his property (R. 29). The trial court dismissed the suit for lack of jurisdiction on the ground that the Trading with the Enemy Act does not authorize any recovery in excess of the net proceeds of the property seized and sold, and that there was no jurisdiction under the Tucker Act, since the claim

exceeded $10,000 (R. 240–241). The court did not pass upon the motion for summary judgment. The Court of Appeals affirmed on the same ground (R. 248–254). A petition for rehearing was denied (R. 255).

ARGUMENT

The action is one against the United States (*Cummings* v. *Deutsche Bank*, 300 U. S. 115, 118), and may not be maintained without the consent of Congress. Petitioner does not and cannot maintain that such consent may be found in the Tucker Act, since the complaint was filed more than six years after the cause of action, if any, arose, and the claim is for an amount in excess of $10,000. Judicial Code, Sec. 24 (20); *Franklin* v. *United States*, 308 U. S. 516. Section 7 (c) of the Trading with the Enemy Act, the only other statute on which the jurisdiction of the district court may be rested, precludes recovery under Section 9 (a) in excess of the "net proceeds" of the sale of the seized property, and this sum has already been paid to petitioner. Petitioner contends, however, that Section 7 (c) does not and cannot validly limit recovery to an amount less than "just compensation." The decision of the court below rejecting this contention is correct and presents no question calling for view by this Court.

1. Section 7 (c) of the Act expressly provides that the sole relief and remedy of any person having any claim to property seized by the Alien

Property Custodian shall be that provided by the terms of the Act, and that in the event of sale or other disposition of such property by the Alien Property Custodian, recovery shall be limited to and enforced against the "net proceeds" received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States. An action for an amount in excess of the "net proceeds" is outside the statutory jurisdiction of the district courts. This limitation is valid even though the "net proceeds" are less than the full value of the seized property. The sovereign's immunity from unconsented suit exists "whatever * * * the source of the right sought to be enforced," whether it be an act of Congress or a provision of the Constitution. *Lynch* v. *United States,* 292 U. S. 571, 581–582.

The decision below is not in conflict with *Becker Steel Co.* v. *Cummings,* 296 U. S. 74. In that case, the Court merely held that, as a matter of statutory construction, the words "net proceeds * * * held" by the Custodian should be interpreted to include the proceeds held by him at any time and not lawfully disbursed. The opinion, it is true, suggests that a narrow construction would raise constitutional doubts, but the Court expressly observed that its conclusion "does no violence to the language of the act" (*id.* at 81). It is clear that the recovery here sought, an amount far greater than the gross proceeds, is in excess

of the "net proceeds," however liberally that term may be construed.

Nor is the decision below in conflict with that of the Court of Claims in *Escher* v. *United States,* 68 C. Cls. 473, certiorari denied, 281 U. S. 752. In that case a suit was brought in the Court of Claims after a claimant had received a return of the net proceeds of his property in a suit in the district court under the Trading with the Enemy Act. The Court of Claims held that the judgment in the action in the district court was *res judicata.* As an alternative ground of decision, the court also held that, by Sections 9 and 7 (c), Congress had vested exclusive jurisdiction of claims growing out of war seizures in the district courts. The court did not consider whether recovery in excess of "net proceeds" could be had under the Trading with the Enemy Act, and the question whether an action could be maintained in the Court of Claims under the Tucker Act is not here involved.

2. Even if the district court had jurisdiction, the petitioner was not entitled to any recovery on the facts adduced in support of respondents' motion for summary judgment.[1] The evidence

[1] Petitioner contended below that the Court of Appeals lacked jurisdiction to pass upon the question of enemy status with its attendant infirmities because the respondents had failed to take a cross appeal from the judgment of the district court, dismissing the complaint on the ground of lack of jurisdiction only. The court below found it unnecessary to pass upon this question. However, it would appear that any matter set up in the motion for summary judgment and

conslusively shows that Pflueger was born in the Kingdom of Hawaii in 1861; that at the age of six he was taken to Germany to be educated and, except for two years' residence in Hawaii between 1884 and 1886, he lived in Germany until 1920; and that during the World War he was engaged in business in Bremen (R. 25–29, 58–60, 249). Section 2 (a) of the Trading with the Enemy Act (*infra,* p. 9) defines an enemy as an individual resident within the territory (including that occupied by the military or naval forces) of any nation with which the United States is at war, or resident outside of the United States and doing business within such territory. Since petitioner not only resided in and carried on business in Germany during the war, but had been domiciled there practically all of his life, he was indubitably an enemy. *The Venus,* 8 Cranch 253, 282–284; *Mrs. Alexander's Cotton,* 2 Wall. 404. The decisions of this Court establish that the property of an enemy, irrespective of his nationality, may be confiscated during times of war and that return of the property or payment of compensation therefor is a matter of grace. *Juragua Iron Co.*

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included in the record which would support the decision below may be urged. *United States* v. *American Ry. Express Co.*, 265 U. S. 425, 435; *Morley Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 190–191. The fact that a trial court limits its judgment to jurisdictional grounds does not preclude an appellate court from affirming on another ground, even when no cross-appeal has been taken. *Langnes* v. *Green*, 282 U. S. 531, 538–539.

v. *United States,* 212 U. S. 297, 305–306; *Herrera* v. *United States,* 222 U. S. 558, 559; *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 120.

CONCLUSION

The case was correctly decided by the court below. There is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1941.

APPENDIX

Section 2 (a) of the Trading with the Enemy Act of October 6, 1917, c. 106, 40 Stat. 411 (50 U. S. C. A. Append.):

> The word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—
>
> Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

* * * * *

Section 7 (c) (concluding paragraph) of the Trading with the Enemy Act as added by the Act of November 4, 1918, c. 201, 40 Stat. 1020, 1021:

* * * * *

> The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Cus-

todian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * *

Section 9 (a) of the Trading with the Enemy Act, as amended (50 U. S. C. A. Append.):

Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of

such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

Section 9 (c) of the Trading with the Enemy Act as amended (50 U. S. C. A. Append.):

Any person whose money or other property the President is authorized to return under the provisions of subsection (b)

hereof may file notice of claim for the return of such money or other property, as provided in subsection (a) hereof, and thereafter may make application to the President for allowance of such claim and/or may institute suit in equity to recover such money or other property, as provided in said subsection, and with like effect. The President or the court, as the case may be, may make the same determinations with respect to citizenship and other relevant facts that the President is authorized to make under the provisions of subsection (b) hereof.

U. S. GOVERNMENT PRINTING OFFICE: 1941

(12)

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PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Respondents endeavor to distinguish *Becker Steel Company* v. *Cummings,* 296 U. S. 74, urging that it did not pass upon the question involved here. They brush aside the fact that this Court specifically left the question involved here open for determination in a case involving the precise point and ignore the language and reasoning of this Court which are contrary to the reasoning of the court below.

The *Becker Steel Company* case stands squarely for the proposition that the remedy afforded a citizen owner of property seized during the war must be adequate to secure to him the return of his property or compensation for it and that any attempted limitation on this would be of doubtful constitutionality. This is implicit in the other decisions of

this Court where the remedial provisions of the Trading with the Enemy Act were considered. (See *Henkels* v. *Sutherland,* 271 U. S. 298, 301; *Miller* v. *Robertson,* 266 U. S. 243, 248; *Stoehr* v. *Wallace,* 255 U. S. 239, 245; *Central Union Trust Company* v. *Garvan,* 254 U. S. 554, 566.) It is aptly summarized in the *Henkels* case, where this Court said (271 U. S. at p. 301):

> "With enemy owned property seized by the Custodian, it has been held the United States may deal as it sees fit, *White* v. *Mechanics Securities Corporation,* 269 U. S. 283; but it has no such latitude in respect of the property of an American citizen."

Respondents rely upon *Lynch* v. *United States,* 292 U. S. 571. The case has no bearing. While stating that the United States could be sued only with its consent, this Court construed a statute repealing all laws pertaining to war risk insurance to be aimed at the right rather than at the remedy, and held that consequently the suit might be maintained. Certainly the case is not an authority for the proposition that consent to be sued was not given an American citizen whose property was sold at less than its value under the Trading with the Enemy Act. Such consent was specifically provided in Section 9 of the Act and this Court has uniformly held that the remedy there provided must be adequate. (See cases cited above.)

The limitation, added by amendment adopted on November 4, 1918, that the quantum of recovery is limited to the proceeds of the sale or other disposition of the property did not purport to change Section 9, the remedial section of the act. The most that can be claimed for it is that it was an attempt by Congress to limit the right to compensation for such seized property to such sum as an administrative

officer of the government might receive for it. In other words, to let such officer determine the amount of compensation to be paid to the citizen. Such legislation clearly runs afoul of the Fifth Amendment and the decision in the *Becker Steel* case. The ascertainment of compensation for property taken by the government is a judicial function and cannot be determined even by Congress itself, let alone an administrative officer. *Monongahela Navigation Company* v. *United States,* 148 U. S. 312.

The decision of the court below and respondents' argument in support of it stand for the proposition that the property of a citizen may be seized and sold by an administrative officer of the government and the citizen owner limited to the proceeds of the sale, irrespective of adequacy. It would seem but a short step further, and implicit in the reasoning of counsel for the respondents and the court below, for the government to take the citizen's property and give him nothing for it. The legislation authorizing the seizure need only deny the owner access to the courts and the result will be confiscation.

We submit that this case presents a question of law that has not been passed upon by this Court, that the decision of the court below is contrary to the reasoning of this Court in the cases cited above and that this Court should review the case.

The respondents, as a second point to their brief, argue (pp. 6-8) that the petition should be denied because the petitioner is not entitled to any recovery on the facts adduced in support of respondents' motion for summary judgment because he was an "enemy." That motion was made before the district court in addition to respondents' motion to dismiss. It was not passed upon by that court or the

Court of Appeals. Respondents took no cross appeal and have not applied for certiorari.

The cases cited by respondents in their footnote (pp. 6-7) are not applicable since they deal only with the rule that an appellee or respondent may, without taking a cross appeal, urge *in support of the decree* any matter appearing in the record even though his argument may involve an attack on the reasoning of the lower court. But these cases expressly point out that an appellee may not attack the decree with a view either to enlarging his own rights or lessening the rights of his adversary.

The decree simply dismissed for lack of jurisdiction. What respondents seek is to enlarge the decree, in effect, have their summary motion granted and thus obtain a final judgment on the merits that the plaintiff was an "enemy" and so not entitled to just compensation. This they cannot do under the very authorities cited by them without themselves petitioning for certiorari.

In any event their contention is groundless because the facts show that shortly after the entry of the United States into the last World War the petitioner, an American citizen, sought to leave Germany, made application for an American passport on June 15, 1917 (Pflueger Ex. 2, R. 197) but did not receive it until a year later (R. 124) after his property in the Hawaiian Islands had been seized. Therefore, he was *in itinere* at the time of the seizure and the cases cited by respondents on page 7 of their brief in support of their contention that the petitioner was an "enemy" are not in point.

Furthermore, respondents overlook and fail to mention that prior to the sale of the petitioner's Hawaiian properties, he protested the seizure and sale and that protest

reached the Custodian before he had disposed of the properties (R. 214-5), but in complete disregard of it he disposed of the valuable properties instead of holding them for the petitioner.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be granted.

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